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Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. [redacted] 35 - 36

SAMUEL B. SMITH,

Petitioner,

vs.

A. B. HALL and L. C. HALL, d. b. a. HALL BROTHERS,

Respondents.

SAMUEL B. SMITH,

Petitioner,

vs.

JAMES MANUFACTURING COMPANY and ELMIRA HATCHERIES, INCORPORATED,

Respondents.

REPLY BRIEF FOR PETITIONER.

CHARLES NEAVE,
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REPLY BRIEF FOR PETITIONER.

This reply brief is limited to comment on one point presented in the brief for respondent Hall, and one point presented in the brief for respondent James.

In the Hall brief, on pages 3 and 4, under the caption "Prior Decisions of Other Courts", comment is submitted on the prior suit on the Smith patent in the New Jersey District Court entitled "*Buckeye Incubator Co. and Samuel B. Smith* vs. *William F. Hillpot*" (22 Fed. 2nd 855 and 24 Fed. 2nd 341). The comment concerns particularly the

decree in that suit and the statement is made that the *Hillpot* decree "specifically states" a provision which is quoted and printed in italics.

Investigation at the office of the Clerk of the New Jersey District Court at Trenton, New Jersey, reveals that two decrees were filed in the *Hillpot* case, and photostat copies of both of them are annexed hereto. Each decree is on a single page and the two pages are within a single cover on which is stamped "Filed Sept. 3, 1927".

On the first decree, the provision quoted and printed in italics on page 3 of respondent Hall's brief is stricken out by lines drawn through all of the words of that provision, and in the margin opposite is written the word "Stricken" together with the initials of Judge Bodine and the date February 20, 1928.

The second decree is like the first with the single exception that this stricken provision is omitted, and at the bottom of this second decree there is written "Entered in this form nunc pro tunc Feb. 20, 1928".

Thus, there is no decree on file in the *Hillpot* case containing the provision quoted and printed in italics on page 3 of respondent Hall's brief, and at no time since February 20, 1928, has there been any such decree on file.

The word "mutilation" and the expression "partial obliteration" do not appear to be appropriate to the change which was made in the *Hillpot* decree by drawing lines through the several words of one provision while leaving that provision plainly legible, placing an endorsement in the margin to indicate when and by whom the change was made, signing and filing a second decree with the stricken clause omitted, and retaining the first decree in the files to indicate what was done and when it was done. Moreover, what was done appears to have been done by the official empowered to do it, namely, the District Court Judge.

The copy of the decree of Judge Bodine in the *Hillpot* case referred to on page 3 of respondent's brief is a cer-

tification by the Clerk of the Court of Appeals of the Third Circuit of a copy of the decree as it appears in the *appeal record* in that case. The date written by Judge Bodine in the margin of the original decree opposite the change made by him shows that the change was made after the appeal record was made up; in fact, it was made just after the opinion of the Court of Appeals was rendered.

The allegation of "mutilation" and "partial obliteration" on page 4 of respondent's brief extends also to the opinion of Judge Bodine in the *Hillpot* case. Examination of the opinion on file in the District Court at Trenton, New Jersey, reveals that one change has been made. It consists in drawing lines through the names "Bassini & Heyden" and writing above in longhand the name "Winkler" as the name of the patentee of patent No. 286,756 referred to in the opinion of Judge Bodine as reported on page 857 of 22 Fed. (2d). This is obviously the correction of an inadvertent mistake because the reference to the Bassini & Heyden patent of a different number appears in the third sentence following.

In the brief for respondent James, the prolonged litigation of the Grant tire patent is cited on pages 2 and 3 as a precedent for the denial of certiorari here. It is, in fact, a *precedent for the grant* of certiorari. In the Grant tire litigation, petitions for certiorari were presented on three different occasions when there was no conflict between decisions of Courts of Appeals on the same issue, and all three applications were denied, as is correctly stated by respondent James on pages 2 and 3 of its brief where the cases are cited and grouped. On one other occasion, there was conflict between decisions of Courts of Appeals on the same issue and certiorari was granted. This Court's opinion in that case appears at 220 U. S. 428.

Respondent James urges that certiorari should not be granted because the conflicting decisions of Courts of Ap-

peals were based on different records. The Grant tire litigation is a precedent against respondent on this point. The conflicting decisions of Courts of Appeals which led to the grant of certiorari in the Grant tire litigation were based on different records. That is made plain in the opinion of this Court (220 U. S. 428), particularly in the portions of the opinion quoted by respondent James on page 5 of its brief.

In applying for certiorari, we stated that there is no difference *of substance* between the records on which the conflicting decisions of Courts of Appeals were based. Respondent James says that there is a difference of substance. In anticipation of that contention, we pointed out in the brief accompanying the petition what are the differences between the several records to thus provide the facts from which one may determine whether or not the differences are of substance or merely of quantity. Such determination is unnecessary, however. It is sufficient that two or more Courts of Appeals have decided the same issue differently, and as to that there is no disagreement. All agree that Courts of Appeals have rendered diametrically opposed decisions as to whether or not the Hastings prior use and publications invalidate the Smith patent. That is the condition which makes the grant of certiorari appropriate, and differences in the records of the cases in which those conflicting decisions were rendered are irrelevant on the issue of whether or not the writ should be granted, as appears to have been recognized by this Court in the Grant tire case.

Respectfully submitted,

CHARLES NEAVE,
DEAN S. EDMONDS,
ALBERT L. ELY.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE BUCKEYE INCUBATOR COMPANY and SAMUEL B. SMITH,

Plaintiffs,

vs. : In Equity No. 2026.

WILLIAM F. WILLPOT,

Defendant.

FINAL DECREE.

This cause came on to be further heard at the April Term of this Court, upon the pleadings and proofs, and was argued by counsel for the respective parties, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED and DECREED, First, that defendant has not infringed plaintiff Smith's Patent No. 1,262,860. Second, ~~that said patent does not disclose a successful method of operation and, consequently, method claims 1 and 2 thereof are invalid and void.~~ Third, that the Bill of Complaint be dismissed. Fourth, that plaintiffs have not infringed defendant's claim 8 of Willpot Patent No. 1,489,597. Fifth, that plaintiffs have not infringed defendant's claims 1 or 2 of Willpot Patent No. 1,545,425. Sixth, that defendant's Counterclaim be dismissed. Seventh, that the parties shall pay their respective costs.

J. C. Bradford
U. S. D. J.

Approved as to form:

Counsel for plaintiffs.

Solicitor for Defendant.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE BUCKEYE INCUBATOR COMPANY and SAMUEL B. SMITH, Plaintiffs	:	Equity 2026
v	:	FINAL DECREE
WILLIAM F. HILLPOT, Defendant.	:	

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J. C. Bodine
Judge

Approved as to form:

Counsel for plaintiffs.

Counsel for defendant

Entered in this form nunc pro tunc
Feby 20th 1928

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

In Equity No. 2026.

The Buckeye Incubator Company and Samuel B. Smith,

Plaintiffs,

vs.

William F. Hillpot.

Defendant.

FILED

SEP 3 1927

AT 9 O'CLOCK A. M

GEORGE T. CRANMER, Clerk.

FINAL DECREE.

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